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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

ARNOLD L. VIA,

Petitioner

v.

DONALD E. WILLIAMS, Commissioner

and

COMMONWEALTH OF VIRGINIA
Division of Motor Vehicles,

Respondents

WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a personalized automobile license plate, which is purchased at extra cost by a vehicle owner in response to an offer by the state division of motor vehicles, a "public forum" or a "limited public forum" within the meaning of prior Court decisions?

2. Does a state official in charge of a custom license plate program have unlimited authority to censor atheistic references on such plates while permitting certain other religious references, or is such authority circumscribed by the first and ninth amendments prohibiting the unlawful establishment of religion and the unlawful restraint of expression, or by the fourteenth amendment requiring equal application of the law?

3. Does the failure to establish clear written regulations for the enforcement of any lawful censorship policy, or the disallowance of such plates solely on the basis of subjective offense to one or more private persons, violate the due process clause of the fourteenth amendment and the establishment of religion clause of the first amendment?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Arnold L. Via, and the Respondents, Donald L. Williams, Commissioner of Motor Vehicles for the Commonwealth of Virginia, and the Commonwealth of Virginia, Division of Motor Vehicles.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont.)

OPINIONS BELOW

The decision of the Division of Motor Vehicles to revoke the Petitioner's license plate, communicated by letters dated April 16, 1985, and May 13, 1985, is set forth in the Appendix beginning at A- 18. The opinions of the Circuit Court of Augusta County, Virginia, dated November 14, 1985, and December 13, 1985, are reproduced at A-3. The opinion of the Supreme Court of Virginia upholding the decision of the circuit court is set forth at A-1.

JURISDICTION

The decision of the Supreme Court of Virginia denying the Petitioner's appeal was rendered on November 18, 1986. The Supreme Court of Virginia denied the Petitioner's Petition for Rehearing on January 16, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The first amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The fourteenth amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Va. Code Ann. § 46.1-102 states: "Every license plate and decal issued by the Division shall remain the property of the Division and shall be subject to be revoked, cancelled and repossessed by the Division at any time as in this title provided."

V.C.A. § 46.1-105.2 provides:

> **§ 46.1-105.2. Issuance of license plates with reserved numbers or letters.**--(a) The Commissioner may, in his discretion, reserve license plates with certain registration numbers or letters or combinations thereof for issuance to persons requesting license plates so numbered and/or lettered and may provide forms for use by persons in submitting requests for such plates.
>
> (b) In addition to any other fees and charges imposed by law, a fee of ten dollars shall be charged upon the issuance to any person of a license plate or set of plates bearing a number specially assigned or reserved to such person. Such fee shall be an annual fee and the revenues derived therefrom shall be disposed of as provided in § 46.1-167.

STATEMENT OF THE CASE

For many years, the Respondent Virginia Division of Motor Vehicles ("DMV") has engaged in a marketing program for what is termed a "Communiplate," or personalized automobile license plate. Many other states have similar programs. Brochures issued by the DMV invite Virginia motorists to use their Communiplates for the expression of their own points of view, opinions, and ideas upon payment of an extra $10 annual fee (A-15). Around 1982, the DMV issued to Arnold L. Via, Petitioner [hereafter "Petitioner" or "Via"], a reserved custom Communiplate reading "ATH-EST" [hereafter "the plate"]. Via, a retired merchant seaman and Navy veteran, is an atheist. This litigation arose when, on April 16, 1985, B.F. Moore, a DMV employee, wrote a letter to Via demanding surrender of the plate because an unidentified "complainant <u>believes</u>

that [the plate] refers to 'atheist' and is offended that we allow such a license to be displayed." (Emphasis added.) (A-18). Moore also cited alleged DMV "policy not to issue license [sic] that may be offensive to any person or group."

In response, Via confirmed that the plate did, in fact, refer to "atheist," and he refused to surrender the plate. He also asked for the time deadline for his compliance. By letter dated May 13, 1985, Moore gave Via a 45-day deadline which appeared to set a date of June 27, 1985 (A-19). Moore again demanded the surrender of the plate and amplified his originally stated "policy" that, since DMV does "not issue any license referring to a diety [sic], we should also not issue licenses referring to a non-diety [sic] as either group [sic] may be offended by the other." At no time did Moore cite Virginia

statutory or regulatory authority to Via, and the Respondents admitted in their pretrial responses and at trial that no regulations have been formally published.

On June 25, 1985, Via, by counsel, filed a Bill for Injunction in the Circuit Court of Augusta County (A-20) and obtained a Decree, ex parte, temporarily restraining the DMV and Commissioner Williams from revoking the plate until a hearing was held on the merits, continued by agreement of the parties to September 3, 1985. On September 3, 1985, the Circuit Court of Augusta County heard testimony and argument by counsel and requested further written argument. Commissioner Williams admitted on examination by Via's counsel that he personally considered the plate to be offensive but denied that his offense was based on his personal religious convictions (A-32). The Respondents also stipulated that the

DMV had issued certain plates which have religious connotations (A-27).

By letter opinion of November 14, 1985 (A-3), the circuit court denied Via's request for a permanent injunction, and by letter opinion of December 13, 1985 (A-8), it denied Via's Motion for Reconsideration. By its final Order of February 24, 1986 (A-11), the circuit court incorporated its letter rulings and denied Via's request for a temporary injunction against the revocation of the plate pending appeal.

On appeal to the Supreme Court of Virginia (A-34), that court refused, on November 18, 1986, to grant the appeal without stating its grounds. It likewise refused the Petitioner's timely request for rehearing on January 16, 1987.

REASONS FOR GRANTING THE WRIT

I. A PERSONALIZED AUTOMOBILE LICENSE PLATE IS A PUBLIC FORUM OR LIMITED PUBLIC FORUM WHICH IS ENTITLED TO FIRST AMENDMENT PROTECTION UNDER THE PRECEDENTS OF THIS COURT.

The decisions of this Court have clearly established that the government may create a public forum for the expression of ideas by intentionally opening a nontraditional forum for public discourse. E.g., Cornelius v. NAACP Legal Defense & Education Fund, 105 S. Ct. 3439, 3439 (1985); Widmar v. Vincent, 454 U.S. 263, 267 (1981). In determining whether such a forum has been created in particular circumstances, the Court has looked to the policy and practice of the government with regard to the place which is sought to be used for expression, and has examined the nature of the property and its compatibility with expressive activity to discern

the government's intent. Id. Thus, in Widmar v. Vincent, supra, the Court held that a state university's express policy of making its meeting facilities available to student groups evidenced a clear intent to create a public forum. Therefore, the university's prohibition on the use of such property on the basis of religions content was found to be violative of the first amendment. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); United States v. Grace, 461 U.S. 171 (1983).

The same general issue is presented in this case. As the record below demonstrates, the DMV initiated a policy of inviting vehicle owners to pay an extra fee in order to purchase license plates with personalized messages. The brochure promoting the use of such license plates specifically states that motorists are encouraged "to express a thought or idea on a Virginia license

plate." It further urges: "Use your imagination. Think of a message you would like to communiplate [communicate] to other motorists. You could tell people who you are . . ., what you do . . ., what you like . . ., or don't like . . ." (A-15). Clearly, the intent of the DMV was in fact to establish license plates as a public forum for all varieties of messages. By virtue of the personalized license plate program, automobile license plates in Virginia are now not only compatible with expressive activity, they are in fact an encouraged medium of expressive activity. Having created such a public forum, the DMV is restrained by the first amendment from restricting the use of this medium on an impermissible basis.

Moreover, this Court has established that even if it is shown that property is not a public forum, control over access to a nonpublic forum

may be based on subject matter only if the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral. Cornelius v. NAACP Legal Defense & Education Fund, supra, 105 S. Ct. at 3451; Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 49 (1983). In this case, therefore, even if it is assumed for the sake of argument that the personalized Virginia license plates are not a public forum of any kind, the DMV must still prove that the denial of expression in this case was reasonable and viewpoint-neutral. The record below indicates, however, that the denial was in fact based on the viewpoint of Via.

This Court has already found that an automobile license plate and the message it contains can raise serious and important issues under the first amendment. See Wooley v. Maynard, 430 U.S.

705 (1977). Similarly, this case raises significant first amendment issues. The issue of the extent of first amendment protection to be given to messages on personalized license plates is of interest not simply to the Petitioner, who has suffered a deprivation of his first amendment rights by virtue of the denial of his expression based on the DMV's views of his atheistic beliefs, but is also important to all other owners of personalized plates. In light of the proliferation of personalized license programs throughout the country, this case presents an timely opportunity for this Court to settle an important national issue by clarifying the extent to which states may censor the content of license plate messages once they have solicited fees for participating in the programs.

II. THE DIVISION OF MOTOR VEHICLES VIOLATED THE PETITIONER'S FREEDOM OF EXPRESSION UNDER THE FIRST, NINTH, AND FOURTEENTH AMENDMENTS BY CENSORING HIS "ATH-EST" LICENSE PLATE.

The decisions of this Court make clear the fact that the most exacting scrutiny is required when a state undertakes to regulate speech on the basis of its content. See, e.g., Carey v. Brown, 447 U.S. 455 (1980); United States v. O'Brien, 391 U.S. 367 (1968). Thus, when the state creates or opens a public forum inviting expression by the public, in order to justify discriminatory exclusion from such forum based on the content of expression, the state must show that its exclusion is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Widmar v. Vincent, supra, 454 U.S. at 269-70.

In the present case, the DMV has revoked

Via's "ATH-EST" license plate solely on the basis of its content--Via's apparent approval or promotion of atheism. The record below demonstrates that although this was indeed the basis for the revocation, the DMV has never articulated any compelling state interest for this censorship. In fact, the reasons advanced by the DMV for revocation of the license plate relate to the desire not to offend anyone, and specifically to the fact that one individual was offended (A-18). This Court has long held, however, that non-obscene speech or expression may not be prohibited merely because it may be offensive to others. E.g., Spence v. Washington, 418 U.S. 412 (1974); Cohen v. California, 403 U.S. 15 (1971).

In addition, the asserted justifications of the DMV for revoking the license plate on the basis of not wanting to appear to endorse a religious belief (A-19) are belied by the fact that

numerous other religiously themed license plates have been approved by the DMV. These plates include words such as "SAVED," "PRAY," and "RISEN" (A-27). Moreover, the DMV's claim that it revoked the plate out of an obligation to maintain religious neutrality is precluded by the holding of Widmar v. Vincent, supra, in which the Court rejected the claim that the establishment clause of the first amendment prevented a university from permitting meetings of religious groups on its campus. As the Court noted in Widmar, an "equal access" policy in connection with opening a public forum to all messages would not run afoul of the three-pronged establishment clause test of Lemon v. Kurtzman, 403 U.S. 602 (1971), for it is unlikely to be found that the primary effect of such a policy would be to advance religion.

In the present case, the DMV can hardly

argue that issuance of the "ATH-EST" license plate is violative of the establishment clause as an endorsement or advancement of religion, for the "Communiplate" program is by its own terms intended to allow messages which are personalized to the owner of the plate. For this reason, it is impossible to imagine that a viewer of Via's plate could ascribe the message to the state rather than to Via.

Therefore, the state is unable to demonstrate any compelling interest in denying Via's expression. Moreover, even if it is assumed that such an interest could be shown, the facts show clearly that the DMV has acted arbitrarily and unequally in implementing the policy which allegedly is intended to advance this interest. By issuing some license plates with religious themes and revoking or denying others, the DMV is clearly denying the equal protection of the laws as

required by the fourteenth amendment. In fact, the DMV's policy appears to demonstrate special deference to religions as opposed to atheism, which has been held to be unconstitutional by this Court. Torcaso v. Watkins, 367 U.S. 495 (1961). It is therefore obvious that even if one accepts the contention of the DMV that a compelling state interest exists in not issuing religiously themed license plates, it has totally failed to demonstrate that its exclusion policy is narrowly tailored to achieve that interest. Consequently, this Court must find that Via's freedom of expression has been unconstitutionally abridged by the DMV.

III. THE STATE'S FAILURE TO ESTABLISH CLEAR STANDARDS FOR CENSORING LICENSE PLATE MESSAGES, AND THE REVOCATION OF LICENSES ON THE BASIS OF SUBJECTIVE OFFENSE TO A SINGLE PRIVATE INDIVIDUAL, VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS.

The record below clearly establishes that the DMV has failed to articulate any standards by which license plate applications are evaluated. Even more egregious is the fact, admitted by the Respondents, that the complaint of one individual will result in the revocation of a personalized license plate which has already been issued. This failure of the DMV to establish any standards with regard to the suppression of expression which it has invited is violative of due process as guaranteed by the fourteenth amendment, and in the present case constitutes an establishment of religion in violation of the first amendment.

The transcript of Commissioner Williams's testimony demonstrates the dangers inherent in permitting a state official to have unfettered discretion to deny the expression of beliefs. He stated at trial that after the license plate was brought to his attention, he personally considered it to be "offensive" based on "what I consider to be Virginian, and based on the rationale about our license plate system." (A-31-32). At other points in the litigation, Williams variously maintained that he did not find the plate offensive (Appellee's Brief in Opposition at Virginia Supreme Court at 1) and stated that the United States was established as a religious nation and equated Via's license plate with obscenity (this statement was made in a television interview after trial in January 1987 on WWBT-TV in Richmond, Virginia; this after-trial evidence should be subpoenaed and included in the record

as material evidence of Commissioner Willams's real basis for his decision). Further testimony showed a totally informal decision-making process at DMV with regard to license plate decisions, including the assertion that certain deities were affirmatively permitted while others were not This Court has repeatedly addressed the dangers of allowing public officials to have wide latitude in matters of censorship, Cox v. Louisiana, 379 U.S. 536 (1965), and in matters of religious preference, Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948). Due process requires that any statute or regulation having the effect of curtailing free expression contain reasonably clear guidelines so as to prevent official arbitrariness or discrimination in its enforcement. Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972).

The event which triggered the action against Mr. Via was the complaint of a private individual claiming offense at the plate. Other plates of a religious nature which have been issued are not revoked by the DMV on the grounds that complaints about those have not been received. Thus, the situation closely parallels the facts in Larkin v. Grendel's Den, 459 U.S. 116 (1982), in which the Court struck down a system which permitted private religious organizations to veto applications for liquor licenses. Such a system, the court held, violated the establishment clause of the first amendment by breaching the traditional "wall" of separation between church and state.

In short, the standardless system by which the DMV determines which license plates are offensive and thus revokable violates due process

and in effect establishes religion by favoring religion over nonbelievers. Cf. Torasco v. Watkins, supra.

CONCLUSION

For the foregoing reasons, it is apparent that the Virginia Division of Motor Vehicles has violated the first, ninth, and fourteenth amendments in deciding to revoke the Petitioner's license plate. A definitive decision in this case at this time could serve to limit the possibility of future litigation over the many other plates in other jurisdictions. Accordingly, the Petitioner requests this Court to grant his Petition for a Writ of Certiorari to the Supreme Court of Virginia.

Respectfully submitted,

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